# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 17, 2013 |
| v | No. 312069<br>Wayne Circuit Court |
| JEROME D. WILLIAMS,<br><br>Defendant-Appellant. | LC No. 12-002571-FH |

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to time served for the marijuana conviction and two years for felony-firearm. We affirm.

## I. FACTUAL BACKGROUND

A police officer was conducting surveillance on a house in Detroit when he observed a black male walk up to the door. The officer saw defendant come to the door, the black male hand defendant money, and defendant hand something back to the man. The object defendant handed the man was obscured by defendant's cupped hand. The officer testified that he had seen at least a hundred similar transactions while working narcotics surveillance operations.

The officer called for backup. When the police approached the house and knocked on the door, defendant answered. The initial officer observed a shotgun and estimated that it was approximately three or four feet from defendant. Another police officer likewise testified that when he pulled defendant away from the door, he saw a shotgun. He also observed that defendant was holding a sandwich bag when he opened the door. Inside the sandwich bag were 19 smaller knotted bags filled with marijuana. Both officers testified that the house was in a state of disrepair, as there was debris and trash on the ground. Defendant did not have any money on his person when he was arrested.

Defendant testified that he was at his friend's house, had stayed overnight, and two friends visited him the morning of the raid. Defendant claimed that the police officers came to the door and when he answered, he was not holding anything. He also testified that the police officers began flipping over furniture and searching the house. According to defendant, some

officers came from the back room with marijuana, and others came from the basement with a shotgun in their hands. Defendant testified that he had no idea there was marijuana or a weapon in the house. He also did not agree that the house was in a state of disrepair.

The jury found defendant guilty of possession with intent to deliver marijuana and felony-firearm. Defendant then filed a motion for a new trial, alleging that the verdict was against the great weight of the evidence and the evidence at trial was legally insufficient. He also contended that he was denied the effective assistance of counsel because his trial counsel did not highlight inconsistencies in police officer testimony, and failed to secure the testimony of Thaddeus Ball, who was with defendant the morning of the raid.

A hearing was held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defense counsel testified that while he tried to obtain contact information regarding other witnesses, defendant never provided him with proper names or contact information. Defense counsel also testified that he did not believe the alleged inconsistencies in the police officers' testimony was significant. He believed that had he attempted to question the officers further, they would "just clean it up." The trial court ultimately denied defendant's motion for a new trial. Defendant now appeals.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Defendant first argues that the trial court erred in denying his motion for a new trial based on the ineffective assistance of counsel. We review "a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. We review factual findings for clear error, but we review de novo questions of constitutional law." *Unger*, 278 Mich App at 242 (citations omitted). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted).

### B. ANALYSIS

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively unreasonable and that the deficient performance was prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 445; 590 NW2d 738 (1999). "To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted). Moreover,

"[d]efense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *Unger*, 278 Mich App at 242. Accordingly, defendant must overcome a strong presumption of effective assistance of counsel. *Id.*

Defendant first claims that defense counsel was ineffective for failing to present the testimony of Thaddeus Ball. Defendant submitted Ball's affidavit, wherein Ball attested that he was with defendant just before the arrest, no weapons or marijuana were present in the living room, and the house did not appear vacant or dirty. However, at the *Ginther* hearing, defendant admitted that he did not give defense counsel Ball's name, phone number, or address because defense counsel was more interested in finding the person who had been living in the house.

"In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne*, 285 Mich App at 190. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted). Moreover, the failure "to interview witnesses does not itself establish inadequate preparation." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). "It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.*

Although defendant now emphasizes how important Ball's testimony would have been, Ball was not present when the police arrived. Moreover, defendant's failure to provide his counsel with any contact information for Ball significantly hampered any possible investigation of this witness. Thus, the relevancy of Ball's testimony was necessarily limited, as the gun and drugs could have been moved after he left but before the police arrived. Defense counsel also testified that he offered to seek an adjournment, but defendant wished to proceed with trial. As the United States Supreme Court has recognized, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland*, 466 US at 691. Thus, defendant was not denied the effective assistance of counsel in this instance.

Defendant next claims that his counsel erred in failing to impeach police officers regarding several inconsistencies between trial and the preliminary examination testimony. At the preliminary examination, one officer testified that the shotgun was 15 to 20 feet away from defendant, whereas at trial the initial officer at the scene indicated that the gun was approximately three to four feet from defendant. While defendant places great weight on this discrepancy, the salient fact is that the gun was near defendant under either version. As defense counsel testified, he felt that the exact distance of the shotgun was not significant because "the gun was readily available" either way. Furthermore, neither officer substantiated defendant's version of events, namely, that the shotgun was in the basement.

Defendant also contends that defense counsel should have illuminated discrepancies regarding whether the police officer observed several drug transactions or just one, and the precise location where they detained defendant. These alleged errors do not rise to the level of

ineffective assistance of counsel. Defense counsel testified that he believed "the big points are more important than the small points" and that minor discrepancies were not "gonna be the saving of a defendant." While defendant clearly disagrees, "[a] difference of opinion regarding trial tactics does not amount to ineffective assistance of counsel." *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). Further, defense counsel testified to his belief that had he attempted to highlight alleged inconsistencies, the police officers would just "clean it up." He made the strategic decision to avoid affording the officers the opportunity to reemphasize their version of the events, and we will not second-guess such trial strategy on appeal. See *Strickland*, 466 US at 689 ("[j]udicial scrutiny of counsel's performance must be highly deferential" and courts should refrain from second-guessing counsel's chosen trial strategy).[1]

Lastly, defendant contends that his defense attorney seriously erred in waiving the testimony of the police officer who recovered the shotgun. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has offered no evidence that this officer would have testified favorably to the defense. In fact, this officer may have confirmed the prosecution's evidence, namely, that the gun was not in the basement but was close to where defendant was located. Defendant has not overcome the strong presumption that defense counsel's decision was sound trial strategy.

We find no reversible error in the trial court's denial of the motion for a new trial based on ineffective assistance of counsel.[2]

## III. SUFFICIENCY OF THE EVIDENCE

### A. STANDARD OF REVIEW

Defendant next claims that the evidence was insufficient to support his convictions. We review this issue de novo. *People v Kloosterman*, 296 Mich App 636, 639; 823 NW2d 134 (2012). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find each element beyond a reasonable doubt. *Id*. "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222.

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[1] Defendant also identifies as an inconsistency that one of the officers did not refer to seeing marijuana when defendant opened the door. However, this is not an inconsistency, as the officer simply did not indicate one way or the other if he saw marijuana.

[2] Because we find no errors, we accordingly find no cumulative effect of errors to justify reversal. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

## B. ANALYSIS

The elements of possession with intent to deliver marijuana are that the recovered substance is marijuana and that defendant knowingly possessed the substance intending to deliver it. See *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005). "Constructive possession exists if the defendant knew that the substance was present and had the right to exercise control over it." *Id.* at 421.

Sufficient evidence was presented to establish these elements. The backup police officer testified that defendant was holding marijuana when he answered the door. The officer further observed that inside the sandwich bag were 19 smaller knotted bags filled with marijuana. As the Michigan Supreme Court recognized, "[i]ntent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992). Furthermore, the officer who had observed the house testified that he saw defendant hand something to a man who came to the door after the man paid defendant. The jury could have reasonably inferred that this was a drug transaction, which is further proof that defendant possessed marijuana with the intent to deliver it.

Defendant also contends that there was insufficient evidence of felony-firearm. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (quotation marks and citation omitted). Possession of a firearm may be actual or constructive as well as joint or exclusive. *Id.* at 83. "[A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Moreover, circumstantial evidence can demonstrate possession, which is a factual question for the jury. *Johnson*, 293 Mich App at 83.

Here, the police officer who was observing the house testified that, after defendant opened the door, he saw the shotgun leaning against the entertainment center, three to four feet from defendant. The backup police officer likewise testified that "as I pulled [defendant] from the door I saw a shotgun." Defendant was the only person in the house and was holding a bag of marijuana when he opened the door. As the Michigan Supreme Court has recognized, "the jury could reasonably have inferred that the defendant was in knowing possession of the firearm based on its proximity to a quantity of controlled substances that the defendant was intending to deliver, the defendant's proximity to both the weapon and the controlled substances, and the well-known relationship between drug dealing and the use of firearms as protection." *People v Rapley*, 483 Mich 1131, 1131; 767 NW2d 444 (2009).

Defendant, however, argues that the prosecution witnesses' testimony was "patently incredible" and "inherently implausible." Defendant asserts, *inter alia*, that no money was found on his person and his fingerprints were not recovered from the gun or bag of marijuana. Yet, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011) (quotation marks and citation omitted). Furthermore, while defendant relies

on perceived inconsistencies, all conflicts in the evidence are resolved in favor of the prosecution and we will not second-guess credibility or weight decisions on appeal. *Unger*, 278 Mich App at 222.

## IV. GREAT WEIGHT OF THE EVIDENCE

### A. STANDARD OF REVIEW

Lastly, defendant argues that the verdict was against the great weight of the evidence. "We review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). An abuse of discretion occurs when the trial court selects an outcome outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

### B. ANALYSIS

A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469. "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.* A defendant's argument that there was conflicting testimony is an insufficient basis for granting a new trial, even if that testimony has been impeached. *Id.* It also is well settled that issues of credibility are within the jury's discretion. *Id.*

In the instant case, we find no error in the trial court's determination that the verdict was not against the great weight of the evidence. One officer testified that he observed what looked like a drug transaction. When the police officers knocked on the door, defendant answered, and was holding marijuana that was packaged in a way indicative of intent to deliver. Further, only defendant was in the residence and the police officers testified that the firearm was located near defendant. In light of this evidence, the trial court did not abuse its discretion in finding that the verdicts were not against the great weight of the evidence. As the Michigan Supreme Court has recognized, "the hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation." *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998) (quotation marks and citation omitted).

## V. CONCLUSION

Defendant was not denied the effective assistance of counsel. Moreover, sufficient evidence supported the verdicts, which were not against the great weight of the evidence. We affirm.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan